

Secretary's Order No.: **2008-F-0020**

RE: Proposed Amendments to Delaware Tidal Finfish Regulation 3507:
Black Sea Bass Size Limit; Trip Limits, Seasons, and Quotas; and
Delaware Shellfish Regulation 3758: Possession of "V-notched" Lobsters
Prohibited

Date of Issuance: May 15, 2008

Effective Date of the Amendment: June 11, 2008

I. Background:

A public hearing was held on Thursday, April 24, 2008, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulation 3507 concerning black sea bass size limits, trip limits, seasons and quotas. Also at issue in this hearing was a minor proposed amendment to Delaware Shellfish Regulation 3758, which concerns the possession of "V-notched" lobsters being prohibited. The Department's statutory basis to act on these matters can be found in 7 Del.C. §903, (3)(2)(a), and 7 Del.C. §1902, §2502. No other regulations are affected by these proposals.

The commercial black sea bass fishery in Delaware is managed by an individual quota system (ITQ) that is distributed to those fishermen meeting specific qualifying criteria for participation in either the fish pot or commercial hook and line fisheries. The current regulations do not allow the transfer of quota between individuals. However, declining quotas due to slower than anticipated stock recovery rates, as well as a lack of

participation by some individuals that are assigned quotas, has created a situation where it would be advantageous to the fishermen to transfer quota in order to fully utilize Delaware's annual commercial black sea bass quota. The Department has proposed that eligible participants in the commercial sea bass fishery be allowed to make a one-time per season transfer of their quota, either in part or in whole, to another eligible participant in either the commercial sea bass pot fishery or the commercial sea bass hook and line fishery, respectively, on forms to be supplied by the Department.

The purpose of the proposed lobster regulatory change found in Delaware Shellfish Regulation 3758 is to bring Delaware into compliance with Addendum XI to Amendment 3 of the Atlantic States Marine Fisheries Commission lobster management plan for federal waters off Delaware, specifically, in what is known as Lobster Conservation Management Area 5. Delaware is required to re-define marking requirements for female lobsters. The mark used, called a "V-notch", is presently defined in Delaware regulations as a straight-sided triangular cut without setal hairs at least 1/4 inch in depth in the right of center tail flipper. This marking technique for released female lobsters is designed so that if the lobster so marked is recaptured, it can be recognized as a mature female and released. Although these marks are required to be applied to lobsters by states north of Delaware, it is possible for marked lobsters to show up in waters off of Delaware or to be

taken from ocean waters north of Delaware and returned to a Delaware port, so Delaware must be in compliance with the federal marking and retention requirements. To remain in compliance Delaware is required to re-define the V-notch to be 1/8 inch or deeper, with or without setal hairs in the notch. With the new definition in force, no one will be allowed to land in Delaware any lobster bearing a V-notch of 1/8 inch or deeper with or without setal hairs, which begin to grow into the notch.

Only two members of the public attended this hearing on April 24, 2008 to listen to the Department's discussion regarding these proposed changes to the above referenced regulations, and no formal objections were raised regarding the same. Afterwards, the Hearing Officer prepared her report regarding this matter and submitted the same to the Secretary for review and consideration. Proper notice of the hearing was provided as required by law.

II. Findings:

The Department has provided sound reasoning with regard to the proposed amendments to the aforementioned regulations, as reflected in the Hearing Officer's Report of May 14, 2008, which is attached and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

1. Proper notice of the hearing was provided as required by law.

2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
4. The Department held a public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed amendment to the existing Delaware Tidal Finfish Regulation 3507 concerning black sea bass size limits, trip limits, seasons and quotas, will allow eligible participants in the commercial sea bass fishery to make a one-time per season transfer of their quota, either in part or in whole, to another eligible participant in either the commercial sea bass pot fishery or the commercial sea bass hook and line fishery, respectively, on forms to be supplied by the Department;
7. Promulgation of the proposed amendment to Delaware Shellfish Regulation 3758 would bring Delaware into compliance with Addendum XI to Amendment 3 of the Atlantic States Marine Fisheries Commission lobster management plan for federal waters off Delaware, specifically, in what is known as Lobster

Conservation Management Area 5, by re-defining V-notch marking requirements for female lobsters;

8. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
9. The Department's proposed regulation, as published in the April 1, 2008 *Delaware Register of Regulations* and set forth in Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
10. The Department's proposed amendments to both Delaware Tidal Finfish Regulation 3507 and Delaware Shellfish Regulation 3758 are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulations, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that

11. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Report dated May 14, 2008 and expressly incorporated herein, it is hereby ordered that the proposed amendments to both Delaware Tidal Finfish Regulation 3507 and Delaware Shellfish Regulation 3758 be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of State of Delaware Tidal Finfish Regulation No. 3507 will allow eligible participants in the commercial sea bass fishery to make a one-time per season transfer of their quota, either in part or in whole, to another eligible participant in either the commercial sea bass pot fishery or the commercial sea bass hook and line fishery, respectively, on forms to be supplied by the Department. The ability to transfer said quotas will be advantageous to eligible fishermen, given the declining quotas due to slower than anticipated stock recovery rates, as well as a lack of participation by some individuals that are assigned quotas here in Delaware, so that Delaware's annual commercial black sea bass quota can be fully utilized.

Additionally, the promulgation of State of Delaware Shellfish Regulation 3758 would bring Delaware into compliance with Addendum XI to Amendment 3 of the Atlantic States Marine Fisheries Commission lobster management plan for federal waters off Delaware, specifically, in what is known as Lobster Conservation Management Area 5, by re-defining V-notch marking requirements for female lobsters.

In developing these regulatory amendments, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy, purposes, and authority of 7 Del. C. §903(e)(2)(a).

/s/ John A. Hughes

John A. Hughes
Secretary

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MEMORANDUM

TO: John A. Hughes, Secretary

FROM: Lisa A. Vest, Hearing Officer

RE: Proposed Amendments to Delaware Tidal Finfish
Regulation 3507: Black Sea Bass Size Limit; Trip Limits,
Seasons, and Quotas; and Delaware Shellfish Regulation
3758: Possession of “V-notched” Lobsters Prohibited

DATE: May 14, 2008

I. Background:

A public hearing was held on Thursday, April 24, 2008, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulation 3507 concerning black sea bass size limits, trip limits, seasons and quotas. Also at issue in this hearing was a minor proposed amendment to Delaware Shellfish Regulation 3758, which concerns the possession of “V-notched” lobsters being prohibited. The Department’s statutory basis to act on these matters can be found in 7 Del.C. §903, (3)(2)(a), and 7 Del.C. §1902, §2502. No other regulations are affected by these proposals.

The commercial black sea bass fishery in Delaware is managed by an individual quota system (ITQ) that is distributed to those fishermen meeting specific qualifying criteria for participation in either the fish pot or commercial hook and line fisheries. The current regulations do not allow the transfer of quota between individuals. However, declining quotas due to slower than anticipated stock recovery rates, as well as a lack of participation by some individuals that are assigned quotas, has created a

situation where it would be advantageous to the fishermen to transfer quota in order to fully utilize Delaware's annual commercial black sea bass quota. The Department has proposed that eligible participants in the commercial sea bass fishery be allowed to make a one-time per season transfer of their quota, either in part or in whole, to another eligible participant in either the commercial sea bass pot fishery or the commercial sea bass hook and line fishery, respectively, on forms to be supplied by the Department.

The purpose of the proposed lobster regulatory change found in Delaware Shellfish Regulation 3758 is to bring Delaware into compliance with Addendum XI to Amendment 3 of the Atlantic States Marine Fisheries Commission lobster management plan for federal waters off Delaware, specifically, in what is known as Lobster Conservation Management Area 5. Delaware is required to re-define marking requirements for female lobsters. The mark used, called a "V-notch", is presently defined in Delaware regulations as a straight-sided triangular cut without setal hairs at least 1/4 inch in depth in the right of center tail flipper. This marking technique for released female lobsters is designed so that if the lobster so marked is recaptured, it can be recognized as a mature female and released. Although these marks are required to be applied to lobsters by states north of Delaware, it is possible for marked lobsters to show up in waters off of Delaware or to be taken from ocean waters north of Delaware and returned to a Delaware

port, so Delaware must be in compliance with the federal marking and retention requirements. To remain in compliance Delaware is required to re-define the V-notch to be 1/8 inch or deeper, with or without setal hairs in the notch. With the new definition in force, no one will be allowed to land in Delaware any lobster bearing a V-notch of 1/8 inch or deeper with or without setal hairs, which begin to grow into the notch.

Only two members of the public attended this hearing on April 24, 2008 to listen to the Department's discussion regarding these proposed changes to the above referenced regulations, and no formal objections were raised regarding the same. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

At the time of the hearing on April 24, 2008, Roy Miller, Fisheries Administrator for the Department's Division of Fish and Wildlife, submitted the Department's exhibits pertaining to these proposed amendments to the Hearing Officer, and offered a brief explanation with regard to the salient points of the proposed amendments to these regulations. This information is as contained above in the previous section of this Hearing Officer's Memorandum, and, for brevity's sake, need not be duplicated in this present section.

For the Secretary's review, Delaware's proposed amendments to these regulations are expressly incorporated into this report and attached hereto as Attachment "A" for that purpose.

It should also be noted that the Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally.

III. Conclusions and Recommendations:

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for the proposed amendments to the existing Delaware Tidal Finfish Regulation 3507 concerning black sea bass size limits, trip limits, seasons and quotas. Similarly, the Department has also justified its minor proposed amendment to Delaware Shellfish Regulation 3758, which concerns the possession of v-notched lobsters being prohibited, and has thoroughly addressed any public questions and/or comments provided during the various phases of the record developed in this matter. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;

3. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
4. The Department held a public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed amendment to the existing Delaware Tidal Finfish Regulation 3507 concerning black sea bass size limits, trip limits, seasons and quotas, will allow eligible participants in the commercial sea bass fishery to make a one-time per season transfer of their quota, either in part or in whole, to another eligible participant in either the commercial sea bass pot fishery or the commercial sea bass hook and line fishery, respectively, on forms to be supplied by the Department;
7. Promulgation of the proposed amendment to Delaware Shellfish Regulation 3758 would bring Delaware into compliance with Addendum XI to Amendment 3 of the Atlantic States Marine Fisheries Commission lobster management plan for federal waters off Delaware, specifically, in what is known as Lobster Conservation Management Area 5, by re-defining V-notch marking requirements for female lobsters;

8. The Department has reviewed these proposed amendments in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
9. The Department's proposed amendments to these regulations, as published in the April 1, 2008 *Delaware Register of Regulations* and set forth in Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that

10. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

_____/s/ Lisa A. Vest_____.
LISA A. VEST
Hearing Officer